Office-Supreme Court, U.S.
FILED
APR 11 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1204

SAM G. MYERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEWTON B. SCHWARTZ
310-317 West Building
Houston, Texas
Attorney for Petitioner

E. L. MERIDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 2
The Questions Presented 2
Statement of the Case 5
Reasons for Granting the Writ 6
I. Misinterpretation of Supreme Court Decisions 7
II. The Importance of the Questions Presented 9
Conclusion 9
Certificate of Service 10
Appendix A, Judgment of the District Court A1
Appendix B, Opinion of the Court of Appeals for the Fifth Circuit A3
Appendix C, Judgment of the Court of Appeals for the Fifth Circuit A5
Appendix D, Order Denying Petition for Rehearing A6

TABLE OF CASES

Brady v. *State of Maryland*, 373 U.S. 83 (1963) 3
Commissioner of Internal Revenue v. *Duberstein*, 363 U.S. 278 (1960) 2, 7, 9

CONSTITUTION AND STATUTES

Fifth Amendment, United States Constitution 3
Sixth Amendment, United States Constitution 4
18 U.S.C. 1508 3
28 U.S.C. 1254 (1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. .....

SAM G. MYERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

SAM G. MYERS herewith respectfully petitions this Honorable Court for a Writ of Certiorari to review of the judgment of the United States Court of Appeals for the Fifth Circuit which was rendered in this cause on February 14, 1966, affirming the conviction of Petitioner on three counts of individual and corporate income tax evasion.

OPINIONS BELOW

The District Court did not render an opinion as such but entered judgment based upon a jury verdict of conviction of three of four counts. The entry of its judg-

ment is copied in full in Appendix A, *infra*. The opinion of the Court of Appeals for the Fifth Circuit, comprising Appendix B, *infra*, is not yet officially reported. Its judgment is made a part hereof as Appendix C and the motion for rehearing was denied (Appendix D).

JURISDICTION

This matter involves the interpretation and application of substantive and procedural matters of Federal Criminal Law. The judgment of the Court of Appeals for the Fifth Circuit was entered on February 14, 1966. Rehearing was denied March 15, 1966. The jurisdiction of this Honorable Court is invoked under Section 1254 (1) of Title 28, United States Code.

THE QUESTIONS PRESENTED

Petitioner's Application for Certiorari presents the following questions of law:

I.

Did this Honorable Court's previous definition distinguishing between common law gifts and gifts within the meaning of the Tax Statutes apply in criminal proceedings and is a voluntary Court charge to the jury based thereon correct?[1]

---

1. *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 (1960). Based thereon the District Court charged the Jury after it had returned to have three questions answered and without request from the jury or from either counsel defined a gift, inter alia, as follows: "A voluntarily executed transfer of his property by one to another, without any consideration or compensation, and therefore, though it might be a common law gift, it is not necessarily a gift within the meaning of the Tax Statute"?

The Court of Appeals for the Fifth Circuit held, without discussion, that this contention was devoid of merit.

II.

Did a District Court err in permitting a juror to make notes during the trial of the evidence after the same was called to his attention, even though the same is expressly not prohibited by Statute?[2]

The Court of Appeals for the Fifth Circuit, without any discussion, held that this contention was devoid of merit.

III.

Did the Trial Court err in not having oral hearing requested by Petitioner to determine contentions in motion and supplemental motions for new trial, supported by affidavit of a juror, involving misconduct of a material and substantial nature in discussing hearsay testimony not admitted by the Court?

The Court of Appeals for the Fifth Circuit, without discussion per curiam held this contention devoid of merit.

IV.

Does a summary which admittedly does not include all the evidence, or Petitioner's theories of the evidence, and which contains conclusions of the Government Agent preparing same, reflecting credibility of witnesses violate the Due Process provisions of the Fifth Amendment[3] and this

---

2. 18 U.S.C. 1508.

3. The Fifth Amendment, U. S. Constitution provides, ". . . nor be deprived of life, liberty or property without due process of law. . .".

Court's decision in *Brady* v. *State of Maryland*[4] and deny Petitioner confrontation of the witnesses against him?[5]

The Court of Appeals for the Fifth Circuit holds:

> "Though the submission to the Jury in tax evasion cases, where the facts are often voluminous and complicated, of summaries of the evidence has often been approved . . . their preparation and use must be carefully handled by the Trial Judge. Having carefully examined the complained of summary, the evidence it purports to cover, and the Court's instructions accompanying its submission to the Jury, we find no impropriety in either the preparation or use here."

V.

Did the District Court err in equivocally responding to a juror's question that the substantial or large portion has no relation to what is alleged in the count in the indictment but it relates to the actual tax amount as filed and paid?

The Court of Appeals for the Fifth Circuit, without discussion, held this devoid of merit, although the indictment charged Defendant with attempting to "evade and defeat a large part of the income tax due and owing."

VI.

Did the District Court err in failing to grant a mistrial because of inflammatory and prejudicial remarks by the prosecuting Assistant United States Attorneys commenting that if the Defendant had any evidence available it would have been produced, and that he had every right to do it and his lawyer would have done it if it was available, and that the Petitioner could have called the Government Agent Brown because he was equally available—

---

4. *Brady* v. *State of Maryland*, 373 U.S. 83 (1963).

5. The Sixth Amendment, U. S. Constitution provides, "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .".

do these comment upon the failure of Petitioner to testify or produce evidence in his behalf?

The Court of Appeals for the Fifth Circuit, without discussion, held this devoid of merit.

STATEMENT OF THE CASE

Petitioner in two counts was charged with personal income tax evasion on his and his former wife's returns and in two counts with causing to be evaded corporate income taxes. He was acquitted on one of the corporate counts involving principally a $50,000 item which Petitioner contended was a gift. Petitioner contends, inter alia, that since he was acquitted for causing the corporation to evade taxes for that year, a conviction cannot stand for personal income taxes based upon constructive dividends from the same corporation.

Principal complaints are the procedural errors in instructing the Jury without its request of either party after the Jury returned to pose certain questions, that a gift in the statutory sense is not necessarily a gift as that term is commonly used and understood.

The indictment charges an attempt to defeat and evade a large part of the tax due and owing. The juror asked the Court:

> "THE JUROR: The substantial or large portion you refer to has no relation to what is alleged in the count in the indictment? I mean it is not substantial as related to how much he is charged with in the count in the indictment, but it relates to the actual tax amount as filed and paid?
>
> "THE COURT: If you will read the indictment carefully, I think you will find that is true. It states that the Defendant undertook to evade a large part of the tax that was in fact due."

Said instruction was at least equivocal and misleading and harm must be presumed therefrom.

The jury then returned to its deliberations and returned a verdict of guilty as to both personal accounts of tax evasion and one count of evading corporate taxes.

Defendant was sentenced to five years to serve concurrently on the three counts. The Court of Appeals for the Fifth Circuit, per curiam, affirmed the judgment of the lower court on February 14, 1966, and denied a rehearing on March 15, 1966.

For the following reasons, Petitioner herewith files for a Writ of Certiorari to review the judgment and opinion below, to the end that Petitioner may have a new trial on remand to the District Court.

REASONS FOR GRANTING THE WRIT

In the instant case the Court of Appeals for the Fifth Circuit has held that a jury in a criminal tax evasion case can properly be instructed that a gift, as that term is used in the Tax Laws, is not necessarily a gift as that term is commonly used and understood. The Court has further approved a jury instruction in response to question that the substantial or large portion of the tax refers to the amounts actually filed and paid and not as to how much Petitioner is charged with in the indictment as being due and owing.

Further, approval has been given to commenting in argument in a case where Petitioner did not take the witness stand, that if he had any evidence available it would have been produced, that he had a right to do it and his lawyer would have done it if it was available. And that the investigating government agent was equally

available for Petitioner to call, when comment and argument was made upon the failure of the Government to call this investigating agent.

Further, it permits jurors to make notes of the evidence even after the same is called to the Court's attention.

It further approves admitting summaries of evidence which contain only the Government theories and conclusions of the Government Agent preparing same labeling income as diverted, and upon credibility, invade the jury's province and deny Petitioner confrontation.

These holdings, it is respectfully submitted, are either in direct conflict with or misinterpret the decisions or misapply the principles emanating from this Honorable Court. Several present for the first time to this Honorable Court questions important to the proper administration and adjudication of Federal Criminal Law.

I.

Misinterpretation of Supreme Court Decisions

Although no definition of gift was requested by either Petitioner or Respondent, nor the jury, the Court while answering questions propounded to it by the Jury, submitted the following verbatim from this Court's decision in *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 (1960):

> "Now, you inquire if the $50,000.00 item was a gift to the Defendant, would he have had to pay personal income tax on it or would the corporation have to pay tax on it.
>
> "If in fact it was a gift in the statutory sense, that is, if it was a gift as that term is used in tax laws, it would not be taxable either to the individual or to the corporation. But a gift, as that term is used

in the tax laws, is not necessarily a gift as that term is commonly used and understood.

"In considering whether this payment was or was not a gift for tax purposes, I give you this instruction as to what is or is not a gift, as the term is used in the tax statutes:

> 'A voluntarily executed transfer of his property by one to another, without any consideration or compensation therefor, though it might be a common law gift, is not necessarily a gift within the meaning of the tax statute. The mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. And, importantly, if the payment proceeds primarily from the constraining force of any moral or legal duty, or from the incentive of anticipated benefit of an economic nature, it is not a gift. And conversely, where the payment is in return for services rendered, it is irrelevant that the donor receives no economic benefit from it. A gift, in the statutory sense, proceeds from a detached and disinterested generosity, out of affection, respect, admiration, charity, or like impulses. The most critical consideration is the transferor's intention.'"

And again a juror asked the Court as follows:

"A JUROR: Could I ask a question, Your Honor?

"THE COURT: Yes?

"THE JUROR: The substantial or large portion you refer to has no relation to what is alleged in the count in the indictment? I mean it is not substantial as related to how much he is charged with in the count in the indictment, but it relates to the actual tax amount as filed and paid?

"THE COURT: If you will read the indictment carefully, I think you will find that is true. It states that the Defendant undertook to evade a large part of the tax that was in fact due."

The Court of Appeals interpreted *Duberstein* to mean that a gift in terms of tax law is not a gift in the common ordinary meaning which laymen understand.

II.

The Importance of the Questions Presented

Whether or not a juror in a criminal proceeding should be permitted to take notes during the trial and into the jury deliberation is a question which has caused considerable dissension in the Federal judiciary.

The voluntary charging of the jury in a criminal proceeding that a gift under the tax law is not really a gift and the equivocal answering of another inquiry that substantially relates to the actual tax amount as filed and paid and not that due and owing under the indictment are unprecedented criminal tax evasion proceedings.

Subtle encroachments upon delicate Constitutional privileges through jury comments upon the failure of the Defendant to produce evidence and witnesses on his behalf is to return to a system of inquisition, and a departure from our accusatorial one. Subtle also is the inroad permitted upon the heretofore Constitutionally protected right of confrontation of witnesses by the use of nameless, faceless summaries which cannot be cross-examined.

THEREFORE, it is the public interest, reconciled with the liberty of the individual, that this application presents.

CONCLUSION

For the foregoing reasons Petitioner Sam G. Myers prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, and that, after

due proceedings had, the judgment of that Court may be reviewed and reversed, to the end that Petitioner's indictment be remanded to the District Court for trial on its merits, all of which it is respectfully submitted.

Newton B. Schwartz

CERTIFICATE OF SERVICE

I certify that three copies hereof have been served upon the United States of America by mailing them in a duly stamped, properly addressed envelope this 8th day of April, 1966, to Woodrow Seals, United States Attorney, 515 Rush at Smith, Federal Building, Houston, Texas, and one copy upon the Solicitor General of the United States, Department of Justice, Washington, D. C.

NEWTON B. SCHWARTZ
Member of the Bar of the Supreme Court
310-317 West Building
Houston, Texas
Attorney for Petitioner

APPENDIX A

Judgment and Commitment (Rev. 7-52)

(Filed July 20, 1964)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States of America
v.
SAM G. MYERS
} No. CR-64-H-53

On this 20th day of July, 1964 came the attorney for the government and the defendant appeared in person and[1] with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty, and a verdict of guilty of the offense of wilfully and knowingly attempting to evade and defeat income taxes, in violation of Title 26, U. S. Code, Sec. 7201 as charged[3] in Counts 1, 2 and 4; and the

---

1. Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

2. Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

3. Insert "in count(s) number " if required.

court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted on Counts 1, 2 and 4, and not guilty on Count 3, as found by the Jury.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] FIVE (5) YEARS on Counts 1, 2 and 4 jointly.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Ben C. Connally,
United States District Judge.

The Court recommends commitment to:[6]

V. Bailey Thomas,
Clerk.

APPROVED: /s/ BSC.

---

4. Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

6. For use of Court wishing to recommend a particular institution.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21783

SAM G. MYERS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 14, 1966.)

Before JONES and BROWN, Circuit Judges, and DYER, District Judge.

PER CURIAM: Of the many procedural errors Appellant asserts to have occurred in his trial for tax evasion, only one has any semblance of merit or requires discussion: permitting the jury to use a summary of the evidence prepared by a Government agent who testified. Though the submission to the jury in tax evasion cases, where the facts are often voluminous and complicated, of summaries of the evidence (in either narrative or tabular form) has often been approved, *Ballantyne v. United*

States, 5 Cir., 1961, 293 F.2d 112, 116, rehearing denied, 294 F.2d 958, cert. denied, 1962, 369 U.S. 802, 82 S.Ct. 641, 7 L.Ed.2d 549; *Conford v. United States*, 10 Cir., 1964, 336 F.2d 285; *Swallow v. United States*, 10 Cir., 1962, 307 F.2d 81; *Turner v. United States*, 4 Cir., 1955, 222 F.2d 926, cert. denied, 350 U.S. 831, 76 S.Ct. 65, 100 L.Ed. 742; *United States v. Kelley*, 2 Cir., 1939, 105 F.2d 912; see 10 Mertens, Federal Income Taxation §55A.22, at 142 (rev. ed. 1964), their preparation and use must be carefully handled by the trial Judge. Having carefully examined the complained of summary, the evidence it purports to cover, and the Court's instructions accompanying its submission to the jury, we find no impropriety in either the preparation or use here.

Although the summary does not include all the evidence, or Appellant's theories of the evidence, it does not purport to. See *Flemister v. United States*, 5 Cir., 1958, 260 F.2d 513. It does not contain anything not in the record, *United States v. Ward*, 3 Cir., 1948, 169 F.2d 460, and identifies in detail the evidence summarized, *Lloyd v. United States*, 5 Cir., 1955, 226 F.2d 9. Finally, in view of its contents and the Judge's instructions regarding its use, this summary did not usurp the province of the jury. *Steele v. United States*, 5 Cir., 1955, 222 F.2d 628.

All other contentions are devoid of merit.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

October Term, 1965

No. 21783

D .C. Docket No. 64-H-53-Criminal

SAM G. MYERS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES and BROWN, Circuit Judges, and DYER, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 14, 1966

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21783

SAM G. MYERS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas.

(Filed March 15, 1966)

On Petition for Rehearing

Before JONES and Brown, Circuit Judges, and DYER, District Judge

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1204

SAM G. MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted on three counts of violating Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201) by wilfully attempting to defeat and evade his personal income taxes for 1957 and 1958 and the taxes of his corporation for the year ending January 31, 1959. He was acquitted on a fourth count charging evasion of corporate taxes for the year ending January 31, 1958 (R. 709). Petitioner was sentenced to serve a joint sentence of five years' imprisonment on the three counts for which he was convicted (R. 750).

During the years involved in the indictment, petitioner was president of a corporation which was engaged in the air-conditioning business. He was in

216-998—66

active charge of operations throughout this period, and acquired all of the stock in 1957 by buying the shares held by Joe Stahl, who had originally financed the corporation. At the time he bought Stahl's shares petitioner explained that he was in tax trouble and that he did not want to involve Stahl. (R. 98–103, 354–358.)

There was evidence that petitioner caused substantial amounts of taxable income to be omitted both from his personal returns and from the corporation's returns. Thus, personal expenses of petitioner's family, such as a mink coat, movie equipment, a piano, and landscaping the grounds of petitioner's home, were paid for by the corporation and deducted as business expenditures, and they were not reported on petitioner's personal returns. (R. 550–562.) Petitioner's accountant followed petitioner's instructions in his treatment of all such items both in the corporate books and in the income-tax returns (R. 466–490), even though he was aware of the illegality of his actions (R. 499–500). In addition, petitioner diverted corporate income to himself without reporting it on his own returns. For example, a supplier of air-conditioners owed the corporation $50,000 as reimbursement of warranty expense incurred by the corporation. A check for the full amount was made out to petitioner personally and deposited in his personal account. The accountant who made out the personal and corporate returns was never informed of this transaction. (R. 188, 204, 236, 241, 459, 483.) An additional $51,212.06, representing rebates from finance companies to the corporation, was likewise

diverted to petitioner, and the accountant was instructed not to record this amount in either corporate books or the personal or corporate tax returns (R. 151, 467, 468, 567–575).

1. Petitioner's contention (Pet. 5) that the nature of a "gift" for income tax purposes was not properly explained to the jury is without merit. His counsel had argued to the jury that the $50,000 check—representing a reimbursement of warranty expense incurred by the corporation—was a "gift," mainly because it had been issued to petitioner personally rather than to the corporation (R. 633). After retiring, the jury in writing requested instruction on whether the check would be taxable if a "gift" (R. 699–700). The instruction thereupon given by the trial court [1] was

[1] The instruction appears at R. 701–702:

> Now, you inquire if the $50,000 item was a gift to the defendant, would he have had to pay a personal income tax on it, or would the corporation have to pay a tax on it.
>
> If in fact it was a gift in the statutory sense, that is, if it was a gift as that term is used in the tax laws, it would not be taxable either to the individual or to the corporation. But a gift, as that term is used in the tax laws, is not necessarily a gift as that term is commonly used and understood.
>
> In considering whether this payment was or was not a gift for tax purposes, I give you this instruction as to what is or is not a gift, as the term is used in the tax statutes:
>
> "A voluntarily executed transfer of his property by one to another, without any consideration or compensation therefor, though it might be a common law gift, is not necessarily a gift within the meaning of the tax statute. The mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. And, importantly, if the payment proceeds

clearly correct, being drafted almost verbatim from the language in *Commissioner* v. *Duberstein*, 363 U.S. 278. See also *United States* v. *Pixton*, 326 F. 2d 626, 628 (C.A. 5); *Estate of Cronheim* v. *Commissioner*, 323 F. 2d 706, 707 (C.A. 8); *Gaugler* v. *United States*, 312 F. 2d 681, 685 (C.A. 2); *Landry* v. *United States*, 227 F. Supp. 631, 634 (E.D. La.).

2. Contrary to petitioner's contention (Pet. 4), the "substantiality" requirement in tax evasion cases was adequately explained to the jury. The indictment alleged that petitioner attempted to evade "a large part of the income taxes due" (R. 11–14). The court instructed the jury that they must find that petitioner "attempted to evade a substantial part" of the tax (R. 684). The jury asked for instruction whether a large or substantial amount would be left if the $50,000 check was eliminated, and the court instructed them that (R. 700):

> I cannot answer your question categorically as to what percentage of a man's income tax he must undertake to evade for it to constitute a substantial or large part thereof. That is a matter upon which I think your common sense and good judgment must be the solution.

---

primarily from the constraining force of any moral or legal duty, or from the incentive of anticipated benefit of an economic nature, it is not a gift. And conversely, where the payment is in return for services rendered, it is irrelevant that the donor receives no economic benefit from it. A gift, in the statutory sense, proceeds from a detached and disinterested generosity, out of affection, respect, admiration, charity, or like impulses. The most critical consideration is the transferor's intention."

That is a definition of gift as used in the statute, the tax statutes.

> The word "substantial" is defined, the ordinary everyday definition, which comes from a dictionary—it does not have any particular legal signification here—is in this fashion: Substantial means considerable in amount, value or the like. Large, as a substantial gain.

The court then reviewed with the jury (R. 703–704) how eliminating the $50,000 from Count 1 would leave $20,000 personal taxable income and tax due of $5,484 (versus reported income of $8,000 and reported tax of $1,800), while Count 3 would be reduced to $67,000 corporate taxable income and $29,885 tax due (versus reported income of $46,000 and tax due of $18,500). The jury foreman assured the court that this answered the jury's question. (R. 704.) In answer to the further question by a juror (R. 704) whether "substantial" or "large" was judged by the amount actually due or by the amount reported, the court pointed out that the indictment itself supplied the answer in referring to "a large part of the tax that was in fact due" (R. 705).

The court's answers to the jury's questions were clear and correct as a matter of law. In all events, no possibility of prejudice could exist since the unreported tax, aside from the $50,000 check, was substantial under any of the various formulations of the relevant test, *i.e.*, it was "substantially in excess of that reported" (*United States* v. *Alker*, 260 F. 2d 135, 140 (C.A. 3)), "greater than sums relatively small under the particular circumstances" (*United States* v. *Beck*, 59–2 U.S.T.C., par. 9486 (W.D. Wash.)), and more than "a few thousand dollars of omissions of taxable

income" (*United States* v. *Nunan*, 236 F. 2d 576 (C.A. 2)).

3. Petitioner's other contentions are without merit. The propriety of the form of the government's summary exhibit was reviewed and approved by the court of appeals after a careful examination by the court of the contents of the summary, its relationship to the record, and the instructions accompanying its submission to the jury (Pet. App. A4). The court of appeals has been alert in other cases to check abuse of this type of document. *Steele* v. *United States*, 222 F. 2d 628 (C.A. 5). Although petitioner's counsel informed the court that he had seen a juror taking notes (R. 325), he requested no action by the court (R. 330), and the trial court may exercise discretion in regulating note taking. *Goodloe* v. *United States*, 188 F. 2d 621 (C.A. D.C.), certiorari denied, 342 U.S. 819; *United States* v. *Chiarella*, 184 F. 2d 903, 907 (C.A. 2); *Chicago & N.W. Ry. Co.* v. *Kelly*, 84 F. 2d 569, 577 (C.A. 8); *Toles* v. *United States*, 308 F. 2d 590, 594 (C.A. 9), certiorari denied, 375 U.S. 836.

The "inflammatory and prejudicial remarks" attributed by petitioner to the prosecutor (Pet. 4) were arguments to the jury that petitioner's counsel would have produced explanatory defense evidence if any such had been available (R. 603, 661, 669) and that the government's evidence was uncontradicted (R. 605, 616, 663). This is proper argument. *Kampmeyer* v. *United States*, 227 F. 2d 313, 323 (C.A. 8); *Jordan* v. *United States*, 324 F. 2d 178 (C.A. 5); *Davis* v. *United States*, 279 F. 2d 127 (C. A. 4), cer-

tiorari denied *sub nom. Cope* v. *United States,* 364 U.S. 822.

Finally, it was not error to deny petitioner's supplemental new trial motion, based upon alleged jury misconduct, without a hearing (Pet. 3). Orders denying new trials relative to juror misconduct are reviewable only for abuse of discretion (*Little* v. *United States,* 331 F. 2d 287, 295 (C.A. 8), certiorari denied, 379 U.S. 834; *United States* v. *Fancher,* 319 F. 2d 604, 606 (C.A. 2)), and it is only the exceptional case where an oral hearing should be allowed on such a motion. *Lyles* v. *United States,* 272 F. 2d 910, 912 (C.A. 5), certiorari denied, 356 U.S. 931; *United States* v. *Crowder,* 351 F. 2d 101, 104 (C.A. 6). The trial court's order, moreover, recited that no hearing had been requested by petitioner with regard to this motion.

The petition for writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966